Rule 4. Appeal as of Right – When Taken.

(a) APPEALS IN CIVIL CASES.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment, or (iv) under Rule 59 for a new trial, the time of appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of

the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any other party within 21 days of its entry and (b) that no such party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) APPEALS IN CRIMINAL CASES. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrests of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be

taken within 10 days after the entry denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after the entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON, INC., et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
AVON PRODUCTS, INC., et al.	:	NO. 91-5015

MEMORANDUM

GILES, J. JULY 7, 1992

Plaintiff Howard L. Scott ("Scott") is the inventor of several skin lubricants and methods of skin lubrication which employ perfluorocarbon resins, also known as Teflon. Co-plaintiffs Fabalon, Inc., The First Foundation, The Karen and Wendy Scott Trust, Charles N. Wragg, Jr., and Beverly L. Wragg are corporations, trusts and individuals to whom Scott has assigned these patents,[1] and co-plaintiff The Fabalon Company, Inc. ("Fabalon"), is a company licensed and authorized to administer the patents.[2] Plaintiffs have filed suit against Avon Products, Inc. ("Avon"), Giorgio of Beverly Hills, Inc. ("Giorgio"), Macsil, Inc. ("Macsil"), United Guardian, Inc. ("United Guardian"), Freeman Industries, Inc. ("Freeman"), and Marubeni America Corporation ("Marubeni"), alleging patent infringement and other related counts.

This memorandum and order address motions to dismiss and/or for summary judgment filed Avon, Giorgio and Macsil. For the reasons stated below, this court grants the motion and enters summary judgment against plaintiffs and in favor of defendants Avon, Giorgio and Macsil.

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1. Scott also assigned patents to Widener College, namely patents '939 and '549.

2. The complaint does not provide any details as to the identity of co-plaintiff Fabalon Laboratories, Inc.

I. BACKGROUND

Scott and several Fabalon representatives met with representatives of Avon in 1987 to discuss the possibility of Avon purchasing the right to use plaintiffs' patents in its cosmetic products. During these meetings plaintiffs provided Avon with descriptions of plaintiffs' products and their contemplated uses. Later, plaintiffs also provided samples of the patented products for Avon's inspection and testing. Several months after the meetings, however, Avon notified plaintiffs that it was declining to enter into a licensing agreement.

Plaintiffs allege that, several years after these meetings, in approximately January of 1991, they discovered that Avon was using plaintiffs' Teflon-based compositions and processes in several of its products. It alleges that it later discovered that the other defendants, including Giorgio and Macsil, were also using its Teflon-based products. Plaintiffs brought suit seeking compensatory damages and an injunction against the use of infringing products and methods.

Specifically, plaintiffs allege infringement of six United States patents and one United Kingdom patent. The United States patents are as follows: 3,932,614 (" '614") ("Method of Lubricating or Softening the Skin"), 4,087,517 (" '517") ("Method of Dry Lubricating the Skin"), 4,062,939 (" '939") ("Perfluorocarbon Resins in a Hair and Scalp Conditioning and Cleansing Composition"), 3,911,106 (" '106") ("Hair and Scalp Conditioning Containing Polytetrafluoroethylene"), 4,115,549 (" '549") ("Coating the Hair with a Heat-Settable Composition"), and 3,949,764 (" '764") ("Treatment of Natural and Synthetic Hair with a Heat-Settable Composition") The British patent is 1,575,201 (" '201") ("Method of Lubricating or Softening the Skin") Complaint, Exhibit A-G.

In addition to alleging patent infringement, plaintiffs accuse Avon, Giorgio and Macsil of theft by deception. Avon and Giorgio are further charged with violations of 18 U.S.C. § 1961 *et seq.*. ("RICO") , and Avon is additionally charged with counts of conspiracy and fraud. All of these counts relate to and stem from the underlying allegation of patent infringement.

Defendants have filed a series of motions to dismiss and/or for summary judgment. This memorandum and order examines the motions filed by Avon, Giorgio and Macsil. All parties have filed affidavits in support of their motions or opposition thereto. The court will consider the affidavit testimony and consider the motions as motions for summary judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment will be entered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It is the moving party which must "demonstrate the absence of a genuine issue of material fact." *Celotex Co v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party makes such a showing, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party must satisfy this burden through the introduction of testimony "as would be admissible in evidence," *Id.*, such as an affidavit or deposition testimony. Fed. R. Civ. P. 56(c). If, however, the moving party ultimately persuades the court that there are no genuine issues of material fact, then the court must decide whether the law dictates an outcome in favor of the moving party. If so, the motion for summary judgment must be granted.

III. PATENT INFRINGEMENT

a. *Failure to construe patent claims*

Analysis of a patent infringement allegation entails a two-step process: "determination of the scope of the claims, as a matter of law; and the factual finding of whether properly construed claims encompass the accused structure." *Texas Instruments v. U.S. Intern. Trade Com'n,* 805 F.2d 1558, 1562 (Fed. Cir. 1986). Here, the "claims" referred to are those listed in the patent at issue, wherein the holder declares "I claim . . . ", followed by the specific description(s) of the product or method covered by the patent. For example, patent '614 reads:

> I claim:
>
> 1. A method of lubricating or softening the skin which comprises applying to the skin a composition comprising water, carboxypolymethylene and about 1 to about 50% by weight of a lubricating agent selected from the group consisting of chlorotrifluoroethylene, the homopolymer of tetrafluoroethylene, the homopolymer of hexafluoropropylene, and the copolymer of tetrafluoroethylene and hexafluoropropylene having the formula $(-CF_2CF_2-CF_2CFCF_3)_n$ where n is an integer corresponding to the number of repeating units in the copolymerized chain, said lubricating agent having a particle size of between about 0.01 to about 30 microns and said composition having a pH of about 7-8.1.
>
> 2. The method of claim 1 wherein the particle size of said lubricating agent is between about 0.01 and about 0.5 microns.

Complaint, Exhibit A. Thus, to analyze whether patent '614 has been infringed, it is necessary to construe the patent's (two) claims and to see whether the allegedly infringing product is encompassed by either of the

claims. To prove infringement, plaintiff must show that the accused product embodies every element of one or more of the claims. *Texas Instruments,* 805 F.2d at 1562.

Plaintiffs have failed to perform this two-step process for any of the patents which they allege to have been infringed, and for that reason alone defendants are entitled to summary judgment. From the outset, plaintiffs' sole allegation has been that defendants' products contained Teflon. While this allegation, together with the general allegation that certain patents have been infringed, may satisfy the notice pleading standard of Fed. R. Civ. P. 8(a), it is insufficient at this point, where defendants have advanced motions for summary judgment.

The problem is that plaintiffs do not own the patent on Teflon *per se.* Thus, it is not enough to show that defendants' products contain *some* amount of Teflon.[3] Rather, plaintiffs have the burden of construing the patent claims at issue and demonstrating that the challenged methods or products are fully encompassed by at least one of a given patent's claims.

For example, in regard to patent '614, cited *supra,* there is no specific allegation nor any documentary evidence that any of the allegedly offending products includes a "lubricating agent having a particle size of between about 0.01 to about 30 microns and said composition having a pH of about 7-8.1" (claim 1) or a similar agent having the particle size of "between about 0.01 and about 0.5 microns" (claim 2). Complaint, Exhibit A. Nor is it alleged or demonstrated that the offending products are composed of "water, carboxypolymethylene and about 1 to about 50% by weight of a lubricating agent". Indeed, it is not even made clear by plaintiffs' expert that the lubricating agents listed in claim 1 of patent '614 are types of Teflon. The court

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3. As discussed *infra*, they have not even done this in regard to some of the targeted products.

presumes that they are, but the court should not have to make such presumptions.

Each of the other patents at issue also contains compositional and/or other physical specifications similar to that cited above, and none is by plaintiffs or by plaintiffs' expert. Complaint, Exhibits C-G. Instead, plaintiffs' expert testimony is limited strictly to the identification of Teflon as one of the components found in defendants' products. Nowhere does plaintiffs' expert cite to the patents' chemical specifications, and (as a result) nowhere does he render an opinion as to the infringement of any of plaintiffs' patents.

b. *Failure to prove unlawful use of Teflon*

Defendants' motions for summary judgment must also be granted on a second, independent ground, as to all but three of Avon's products, *see infra.* Even if the court is correct in presuming that the chemical substances listed in plaintiffs' patents are Teflon, and putting aside plaintiffs' failure to construe the patent claims properly, plaintiffs have also failed to support their proposition that defendants' products contain Teflon sufficient to violate plaintiffs' patents.

Turning first to the Giorgio products, plaintiffs' allegation that Teflon is used in them ***at all*** is utterly without foundation. Plaintiffs' identified expert witness is Dr. Yen Wei, Associate Professor of Polymer Chemistry at Drexel University. Dr. Wei offered affidavit testimony after performing a spectroscopic analysis and solubility test on two Giorgio products.

In his analysis of Giorgio Beverly Hill Extraordinary After Shave Lotion with Collagen (sample #25), Dr. Wei concludes: "This sample definitely contains polymer. The polymer might be the collagen, which is listed as an ingredient in the label of the product. Note that collagen is a natural polymer." Plaintiffs' Memorandum in opposition to Giorgio Motion to Dismiss or for Summary Judgment, Exhibit A. This conclusion does not dictate the presence of Teflon.

In his analysis of Giorgio Beverly Hill Extraordinary Exau de toilette natural Spray (sample #26), Dr. Wei concludes: "This sample is likely to contain polymer, which might have ester functional groups. The data are not sufficient to determine whether there are fluorine-containing polymers (Teflon] in the sample." *Id.* While the possible presence of Teflon is at least mentioned in this second conclusion, Dr. Wei states that he cannot determine whether any Teflon is present. Thus, there is no evidence that either Giorgio product contains *any* Teflon, much less a level of Teflon which would amount to a violation of plaintiffs' patents.

The only Macsil product alleged to infringe is Balmex, an emollient and protective ointment. Dr. Wei's analysis led him to conclude: "This cosmetic product might contain Teflon because the IR bands match those of typical Teflon standards to certain extent. Since the exact match of the bands was not observed, no definite conclusion can be drawn from these data." Memorandum in Support of Macsills Motion to Dismiss or for Summary Judgment, Exhibit A at 11.

Balmex was one of the products (along with several Avon products, *see infra*) which was subsequently sent to Micro-Analysis, Inc. ("Micro-Analysis"), for an elemental analysis. According to the elemental analysis the Balmex sample sent by Dr. Wei is .46% fluorine by weight. Memorandum in opposition to Avon's Motion to Dismiss or for Summary Judgment, Exhibit A at 11. In his deposition testimony, however, Dr. Wei testified that the sample sent to Micro-Analysis consisted of a solid extract from a larger amount of (wet) Balmex. Memorandum in Support of Avon and Giorgio's Motion to Dismiss or for Summary Judgment, Exhibit D at 91-100. According to Macsills expert, John G. Nikelly, a professor of analytical chemistry at the Philadelphia College of Pharmacy and Science, the percentage reported by Micro-Analysis must therefore be divided by approximately fourteen to yield the percentage attributable to

the original sample of (pure) Balmex.[4] Memorandum in Support of Macsills motion to Dismiss or for Summary Judgment, Exhibit G at ¶4. This means that, according to Micro-Analysis' elemental analysis of the dry sample, Balmex is approximately .03% fluorine. Professor Nikelly ordered his own elemental analysis from Oneida Research Services, Inc., which yielded a fluorine content of only .01% for the dry sample, or .0007% for the Balmex product. *Id.*

Based upon Micro-Analysis' elemental analysis of the Avon and Macsil products, including Balmex, Dr. Wei amended his original set of conclusions to state that "[b]ased on the ingredients listed for each product there would be no other basis for the existence of fluorine in the products but for the inclusion of perfluorocarbon resin." Opposition to Macsil Motion to Dismiss or for Summary Judgment, Wei Affidavit at ¶7. Even this conclusion, however, falls short of the type of affirmative statement needed to survive defendants' motion for summary judgment.

It is unconstested that cosmetics may pick up trace amounts of fluorine during the manufacturing process, either through water or through certain metals. Avon's Motion to Dismiss or for Summary Judgment, Declaration of Dr. Benjamin Mosier at ¶12. The above-cited conclusion by Dr. Wei does not take this possibility into account. Ultimately, all Dr. Wei says is that, aside from trace amounts of fluorine picked up through the manufacturing process, only the presence of Teflon could account for the amounts of fluorine found in the Avon and Macsil products given the ingredients listed on their labels. This is simply not enough. Dr. Wei is unable to state affirmatively that the products *do* contain Teflon,

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4. Dr. Wei admits the necessity of dividing the dry sample percentage but does not offer a suggested number. Memorandum in Support of Avon and Giorgio's Motion to Dismiss or for Summary Judgment, Exhibit D at 91-100.

and he does not take into account the effects of the manufacturing process.

Moreover, Dr. Wei himself states that the elemental analysis of Balmex "may not be reliable since ion-exchange chromatography was used on the sample prior to elemental analysis." Memorandum in Opposition to Avon's Motion to Dismiss or for Summary Judgment, Exhibit A at 11. Professor Nikelly's conclusion that Balmex does not contain Teflon is based upon a much lower finding of .0007% fluorine content and contains no such disclaimer. *Id.* at ¶5. Plaintiffs have not met their burden of raising a genuine issue as to the presence of Teflon in the Macsil product.

Plaintiffs target a number of Avon products. For each of the following products, Dr. Wei's initial conclusion as to the presence of Teflon in these products was either "negative" or "might contain small amount of fluoro-compound but not sure": Daily Revival (sample #8), Night-Odyssey Shimmering Perfumed Talc (sample #12), Sun Seekers FACE Cream (sample #13), and Skin-So-Soft Hand & Body Lotion (sample #16). These and other Avon products were then sent to Micro-Analysis for further testing, after which Dr. Wei rendered his amended conclusion. For the reasons stated *supra*, however, Dr. Wei's initial conclusion, together with the limited nature of his amended one, are insufficient to demonstrate the presence of Teflon in the above-cited products.

Three Avon products remain to be considered: Sun Seekers Lotion (sample #10), Sun Seekers Children's Cream (sample #11), and Banishing cream (sample #4). Dr. Wei's initial analysis as to Teflon content yielded conclusions of "positive" for Sun Seeker's Lotion and Sun Seeker's Children's Cream and "quite sure" for Banishing Cream. The elemental analysis performed by Micro-Analysis yielded fluorine contents of 2.47%, 1.09%, and 14.95%, respectively. Again, however, this is the percentage of fluorine in the *dry* samples, not in the pure (product) ones. After dividing by fourteen, *see*

supra, the applicable percentages are approximately .18%, .08%, and 1.07 respectively, which correlate to Teflon weight contents of approximately .24%, .11% and 1.43%. opposition to Avon's Motion to Dismiss or for Summary Judgment, Exhibit A at 9. For these products, then, there is a genuine factual issue as to fluorine content of those percentages, notwithstanding the far lower percentages reported by Avon's expert, Dr. Mosier (.004%, .004%, and from .005%-.05%, respectively). Avon's Motion to Dismiss or for Summary Judgment, Declaration of Dr. Benjamin Mosier.

If the court assumes that the fluorine weights assigned by Micro-Analysis are accurate (as it must do in ruling on a motion for summary judgment), then these three Avon products do meet the Teflon weight requirement for some of the patents at issue. Nonetheless, plaintiffs' allegations of patent infringement still fail, because, as discussed *supra*, plaintiffs fail to construe and apply *each* element of at least one patent claim. For example, the holder of patent '106 claims as follows in claim 3:

> The method of claim 1 wherein said polytetrafluoroethylene is in a composition which also includes a thickening agent selected from the group consisting of a high molecular weight carboxyvinyl polymer comprising polyacrylic acid crosslinked with about 1% of polyallyl sucrose having an average of about 5.8 allyl groups for each sucrose molecule, methyl cellulose and a fatty alcohol, and a lubricating and dressing agent, said polytetrafluoroethylene being present in said composition in a proportion of about 0.1 to about 10% by weight, said thickening agent being present in a proportion of about 0.2 to 5% by weight, said thickening agent being present in a proportion of about 0.2 to 5% by weight and said lubricating and dressing agent being present in a proportion of about 5-80% by weight, the remainder being water.

While the Teflon weight content of the last three Avon products meets the weight requirement listed herein ("0.1 to about 10%"), there is no proof that any of the other claim elements are likewise met. Thus, the patent infringement claim fails for these three products as well.

IV. DERIVATIVE CLAIMS

The remainder of the counts in plaintiffs' Complaint allege conspiracy, fraud, theft by deception, and violations of RICO. Counts II-V. Each of these counts stems from the allegations of patent infringement examined above, although each count also requires plaintiffs to prove additional elements (conspiracy, for example, requires two or more of the defendants to have agreed together to infringe plaintiffs' patents). Because defendants are entitled to summary judgment on the patent infringement count, they are likewise entitled to judgment on the remaining counts. It is therefore unnecessary for the court to analyze defendants' other arguments for dismissal of Counts II-V.

V. CONCLUSION

Several contentions made by plaintiffs in opposing Macsills motion (but relating to all of the motions) deserve comment. Plaintiffs notes that by order dated November 27, 1991, this court denied a motion for summary judgment which Macsil had filed on September 20, 1991. Plaintiffs point out that the evidence presented at the time of that first motion is little different from that which is presented now, and they argue that the court must therefore deny summary judgment as it did in response to the first motion. A second, related point made by plaintiffs is that the court should not, in any event, grant defendants' motion until plaintiffs have more time to perform discovery, since plaintiffs' former counsel has just recently been substituted for new counsel.

The response to these two contentions is the same: plaintiffs have had more than ample time and opportunity to develop a case sufficient to withstand defendants'

motions for summary judgment. Macsills motion for summary judgment was denied based upon the following rationale:

> Granted, these chemical studies do not conclusively establish that Macsills products contain the patented resins, and plaintiff may ultimately be unable to prove such at trial. However, these studies do raise a genuine issue of material fact, which is all that is required at the summary judgment stage. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-24 (1986). Plaintiffs may still be able to obtain more conclusive lab results, and even if they cannot, they may be able to prove their case through a combination of circumstancial evidence. Therefore, summary judgment is not warranted at this time.

The Fabalon Company, et al. v. Avon Products, et al., Civil Action No. 91-5015 at ¶3 (E.D. Pa. Nov. 27, 1991).

As the court's prior ruling made clear, summary judgment was not proper "at this time" based solely on the specific possibility that "[p]laintiffs may still be able to obtain more conclusive lab results" or otherwise "prove their case through a combination of circumstancial evidence." *Id.* Almost eight months later, plaintiffs have done neither. Their evidence has advanced no further. Accordingly, defendants are entitled to summary judgment.

It matters not that plaintiffs have recently acquired new counsel, inasmuch as no new evidence has been revealed supportive of plaintiffs' claims. New counsel only entered the case in May 1992, subsequent to an April 1992 conference at which the court gave defendant Macsil a timetable for the filing of another motion for summary judgment. Almost six months passed between the court's order in November 1991 and the filing of Macsills second motion for summary judgment. Plaintiffs have had ample time and opportunity to prosecute their case and to defend against this second round of motions. Plaintiffs are not entitled to prolong a case

indefinitely, nor the court its decision on just motions for summary judgment.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE FABALON, INC., et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
AVON PRODUCTS, INC., et al.	:	NO. 91-5015

ORDER

AND NOW, this 7th day of July, 1992, it is hereby ORDERED that:

1. Defendants' motions to dismiss or for summary judgment (docketed as Nos. 65, 67, and 68) are GRANTED, and summary judgment is ENTERED against plaintiffs and in favor of defendants Avon Products, Inc., Giorgio of Beverly Hills, Inc., and Macsil, Inc. Macsil, Inc.'s motion for sanctions and attorney's fees is DENIED.

2. Defendants United Guardian, Inc., and Freeman Industries, Inc., are DISMISSED pursuant to the conference held June 29, 1992, at which time the court ruled that it would enforce the settlement agreement previously entered into between plaintiffs and those defendants. The court retains jurisdiction to enforce the terms of said settlement.

3. This order having resolved the case as to all plaintiffs and defendants (defendant Marubeni, Inc., having previously been dismissed from the case), this matter is marked CLOSED.

BY THE COURT:

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J.